

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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AMERICAN HOME ASSURANCE COMPANY,

Plaintiff/Counter-Defendant-  
Appellant/Cross-Appellee,

v

PORT HURON HOSPITAL

Defendant/Counter-Plaintiff-  
Appellee-Cross-Appellant.

UNPUBLISHED

April 3, 2003

No. 234190

St. Clair Circuit Court

LC No. 99-000934-CK

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AMERICAN HOME ASSURANCE COMPANY,

Plaintiff/Counter-Defendant-  
Appellant,

v

PORT HURON HOSPITAL,

Defendant/Counter-Plaintiff-  
Appellee.

No. 237136

St. Clair Circuit Court

LC No. 99-000934-CK

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AMERICAN HOME ASSURANCE COMPANY,

Plaintiff-Appellee,

v

PORT HURON HOSPITAL,

Defendant-Appellant.

No. 237311

St. Clair Circuit Court

LC No. 99-000934-CK

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Before: Cooper, P.J., and Murphy and Kelly, JJ.

PER CURIAM.

In this consolidated case, plaintiff appeals as of right the trial court's grant of defendant's motion for summary disposition under MCR 2.116(C)(7) and (10), and the trial court's order denying its motion for sanctions under MCR 2.114. Defendant cross appeals the trial court's denial of its motion for summary disposition under MCR 2.116(C)(9) and (10), and the trial court's grant of plaintiff's motion for case evaluation sanctions. We affirm.

This subrogation action arose when defendant refused to defend and indemnify a staff psychologist, Deloras Maas, in a malpractice action that a suicide victim's estate brought against Maas and other members of defendant's staff. Plaintiff defended Maas in the underlying action and then sought indemnification from defendant. In response, defendant counterclaimed, asserting that the estate only sued because it was vicariously liable for Maas. Accordingly, defendant alleged that it was entitled to reimbursement from plaintiff for its settlement costs and attorney fees.

Plaintiff initially argues that the trial court erred when it granted defendant summary disposition on the basis of laches, MCR 2.116(C)(7), and the lack of an express indemnity contract, MCR 2.116(C)(10). We disagree. We review de novo a trial court's grant or denial of summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

We need not address the laches issue as we find that plaintiff failed to provide any evidence from which reasonable minds could conclude that defendant's employment policy booklet was actually an express malpractice insurance contract. Our Supreme Court has held that an employer's statement of policy, without "specificity and commitment," cannot amount to a contractual promise. *Lytle v Malady*, 458 Mich 153, 165; 579 NW2d 906 (1998). Defendant's handbook lacked both. Because the estate's allegations against Maas required plaintiff to plead and prove an express indemnity contract, *Oberle v Hawthorne Metal Products Co*, 192 Mich App 265, 269-270; 480 NW2d 330 (1991), the trial court did not err when it granted defendant's motion for summary disposition on plaintiff's claim.

Plaintiff next maintains that the trial court erred when it refused to levy sanctions against defendant for filing a frivolous counterclaim. We disagree. We review for clear error a trial court's decision whether a claim is frivolous. *Cvengros v Farm Bureau Ins*, 216 Mich App 261, 266; 548 NW2d 698 (1996). While defendant's counterclaim was unsuccessful, sanctions for violating MCR 2.114(D)(2) are only appropriate when a party presents a document that is not: (1) well grounded in fact; and (2) supported by existing law or a good-faith argument that the law should change. MCR 2.114(D)(2). Likewise, MCL 600.2591(3)(a)(iii) allows a trial court to sanction an attorney or party for bringing an action when "[t]he party's legal position was devoid of arguable legal merit."

Defendant argued below that it was entitled to common law indemnity from plaintiff because the facts sustaining the estate's claim only vicariously implicated defendant. *Oberle*, *supra* at 269-270. It further argued that the trial court should look beyond the estate's complaint to the estate's factual assertions. *Peebles v Detroit (On Rehearing)*, 99 Mich App 285, 292-293; 297 NW2d 839 (1980). While these arguments were unsuccessful, we do not find that they were completely groundless or "devoid of arguable legal merit." MCL 600.2591(3)(a)(iii). Thus, the trial court properly refused plaintiff's request for sanctions.

Defendant further opines that the trial court erred in denying its summary disposition motion on its counterclaim. We disagree. The estate's complaint clearly alleges active negligence by defendant. *Oberle, supra* at 269-270. This fact alone precludes summary disposition in defendant's favor. Therefore, the trial court did not err when it denied defendant's summary disposition motion on its counterclaim.

Defendant next asserts that the trial court erred in granting plaintiff's motion for case evaluation sanctions, and abused its discretion when it determined the amount of attorney fees to award. We disagree. A trial court's grant of case evaluation sanctions is subject to de novo review on appeal. *Elia v Hazen*, 242 Mich App 374, 376-377; 619 NW2d 1 (2000). However, a trial court's determination of reasonable attorney fees is reviewed for an abuse of discretion. *Id.* at 377. A trial court levies reasonable attorney fees when a party refuses a case evaluation award and then fails to receive a more favorable verdict. MCR 2.403(O)(1). A trial court may, "in the interest of justice," refuse to award the prevailing party attorney fees when the "verdict" is summary disposition. MCR 2.403(O)(11).

Defendant argues that the trial court abused its discretion when it granted plaintiff attorney fees contrary to "the interest of justice." However, defendant has proffered no justification for its rejection of a case evaluation award in its favor for the entire base amount of its claim. We further find no merit to defendant's assertion that attorney fees were improperly assessed because its overall position improved when it refused another case evaluation award to plaintiff for \$50,000. These case evaluation awards were separate, so defendant was not forced to accept the adverse award for plaintiff's claim. Therefore, the trial court did not abuse its discretion.

Defendant further maintains that the trial court abused its discretion when it found plaintiff's hourly rate for attorney fees reasonable, despite plaintiff's failure to provide any empirical data justifying the rate. *Temple v Kelel Distributing Co*, 183 Mich App 326, 333; 454 NW2d 610 (1990). In *Temple*, we held that empirical data should guide a trial court's reasonable fees determination. *Id.* We find *Temple* distinguishable, however, because it involved a trial court's grant of attorney fees based on a contingency contract. *Id.* In this case, the trial court adopted the hourly rate in the contract between plaintiff and its attorney as reasonable. Furthermore, plaintiff's hourly rate falls within the suggested rates provided in *Temple* as empirical guideposts. *Id.* at 333, n 3. Therefore, the trial court did not abuse its discretion when it found plaintiff's hourly rate for attorney fees reasonable.

Affirmed.

/s/ Jessica R. Cooper  
/s/ William B. Murphy  
/s/ Kirsten Frank Kelly